IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 209

JOSEPH LYLE STONER,

Petitioner,

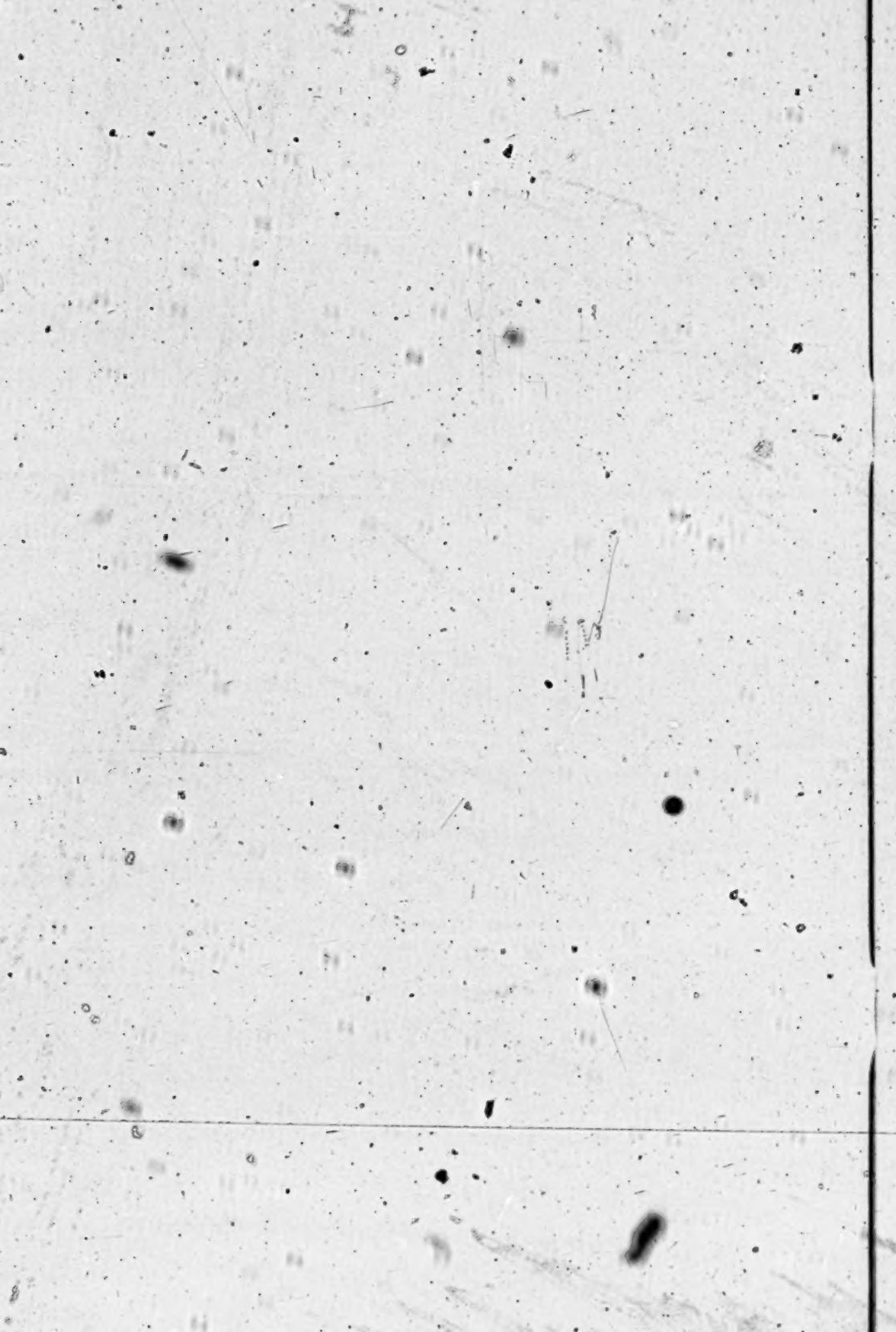
v.

CALIFORNIA,

Respondent.

BRIEF FOR PETITIONER

WILLIAM H. DEMPSEY, JR.
734 15th Street, N. W.
Washington, D. C.
Attorney for Petitioner
(Appointed by this Court)



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Opinions Below

The opinion of the District Court of Appeal of the State of California is reported at 205 Cal. App. 2d 108, 22 Cal. Rptr. 718 (R. 121). The order of the Supreme Court of California denying hearing is not officially reported. It appears in the Transcript of Record at page 130.

Jurisdiction

The order of the Supreme Court of California was entered on August 22, 1962 (R. 130). The jurisdiction of this Court rests upon 28 U.S.C. 1257(3). The petition for a writ of certiorari was granted on June 17, 1963. 374 U.S. 826.

Question Presented

Whether, under the Fourteenth Amendment to the United States Constitution, certain evidence should have been excluded in the state criminal proceeding against petitioner, where that evidence was seized by state officers after an unauthorized entry into petitioner's locked hotel room without search or arrest warrant and without any apparent reason for not securing a warrant, where petitioner was not present, where no crime was being committed in the room at the time, where petitioner was not arrested until some 37 hours thereafter in another state, and where some of the evidence was neither contraband nor the fruits of crime nor the means or instrumentalities of committing crime.

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section one of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, are subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

At issue in this case is the constitutionality of a search and seizure by state police officers. More particularly, the question is whether the search and seizure, though without validation of warrant, can nonetheless be justified under the Fourteenth Amendment to the United States Constitution as incident to an arrest. The circumstances relevant to this question are as follows:

Petitioner was tried in the Superior Court of California for the County of Los Angeles on a charge of armed robbery, a violation of sections 211 and 211a of the California Penal Code (R. 1). At the trial, the prosecution relied upon the testimony of two eyewitnesses to the crime, an alleged accomplice, and two police officers. The eyewitnesses—David Greely and Donna May Ray—were employed in the Budget Town Market in Monrovia, California, the site of the robbery, and were working there on October 25, 1960, the night of the crime (R. 16, 27). They testified that, at about 8 o'clock that evening, the store had been robbed by two men, one of whom had a gun. Both identified petitioner as the robber with the gun, and Mr. Greely identified the second man as one Peter Schales, the third government witness. (Mrs. Ray could not identify the second man.) (R. 16-19, 27-29.)

In the course of the examination of both Mr. Greely and Mrs. Ray, the prosecution buttressed the identification testimony by use of certain items, most of which, as the testi-

mony of the police officers subsequently established, had been taken by the police from petitioner's hotel room. Thus, Mr. Greely testified that a gun showed to him by the prosecutor appeared to be the weapon that had been used by petitioner, and that a gray hat, a pair of horn-rimmed glasses, and a gray jacket looked like the hat, glasses and jacket worn by petitioner at the time of the crime (R. 17, 25-26, 61). Mrs. Ray's testimony was substantially the same (R. 29-30, 32-34, 39-40).

These same items were used in similar fashion by the prosecutor during the interrogation of the alleged accomplice, Peter Schales. Schales testified that he and petitioner had committed the crime; that the gun showed to him by the prosecutor appeared to be the weapon used by petitioner during the robbery; and that the hat and glasses (although not the jacket) showed to him by the prosecutor appeared to be the hat and glasses worn by petitioner on the night of the crime (R. 43-48).

The last two prosecution witnesses were detectives Charles Gilliland and Frederick Collins of the Monrovia police force. Over objection, they were permitted to furnish testimony that was critically important in two respects: First, their testimony established that the gun, the jacket, and the glasses (although not the hat) which had been identified by the preceding witnesses, together with cartridges for the gun, had been taken by them and another officer from petitioner's hotel room (R. 66, 76, 98-99). Second, Gilliland testified that petitioner had confessed to the crime and had admitted using the gun (R. 93-94).[1]

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[1] Defense counsel contended that the confession, which had been obtained after about 3 days of custody prior to a hearing before a magistrate, during which time petitioner saw no friends, relatives, or lawyers, had been involuntary. This issue was excluded from review by this Court. 374 U.S. 826.

Petitioner's defense consisted principally of testimony by two witnesses that he had been with them at the time of the crime.[2] In addition, petitioner's counsel attempted to undermine the prosecution's case by attacking the credibility of Schales on the theory that he had implicated petitioner in return for a light sentence.[3]

Thus it is apparent that the conviction rested upon a resolution of the issue of credibility by the jury against petitioner's witnesses and in favor of the state's, and it is also apparent that the evidence seized from petitioner's hotel room probably had a considerable influence upon the jury. It is the testimony concerning the search for and seizure of this evidence with which we are particularly concerned.

Upon petitioner's objection to introduction in evidence of the gun, cartridges, jacket, and glasses, and to introduction of testimony by the detectives concerning them, the court took testimony from detective Gilliland on *voir dire* outside the presence of the jury. This testimony, together with testimony by both Gilliland and detective Collins before the jury after the exhibits were admitted, established the following facts:

Shortly after the robbery, the manager of the Budget Town Market turned over to Gilliland a check book and

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[2] Petitioner did not take the stand. It may be noted in this connection that he was charged with two prior felony convictions and was sentenced as an habitual criminal (R. 2, 120).

[3] On cross-examination, Schales admitted that he had already pleaded guilty to the robbery and had been given only a one year county jail sentence, and also admitted that he had told petitioner, "If I don't involve you in this, if I don't testify, things are going to go rough for me." However, he maintained that, while he had asked the police about a sentence recommendation, he had never been promised leniency; and, so far as his statement to petitioner was concerned, he testified: "I'm trying to do what is right. And that's what I meant when I told him that" (R. 49, 51, 55, 59-60).

deposit book that had been found in the store's parking lot. Petitioner's name appeared in the deposit book, and Gilliland learned through the Bank of America that the check book was also registered to petitioner (R. 69).

Stubs in the check book indicated that two checks had been drawn several days before the robbery to the Mayfair Hotel in Pomona, California, one of them for rent. Mr. Gilliland thereupon inquired of the police department in Pomona whether a Joey L. Stoner had a police record, and discovered that a person of that name had been convicted of robbery and murder. Next, Gilliland obtained a photograph of Joey L. Stoner from the Pomona police and showed it to the two eyewitnesses, Mr. Greely and Mrs. Ray. "They both stated that this looked like the man who held the gun, however, they would like to see him in person" (R. 70-71).

At about 10 o'clock on the evening of October 27, 1960,[4] two days after the robbery, detectives Gilliland and Collins went to Pomona and conferred with the Pomona police. Two members of the Pomona force thereupon accompanied Gilliland and Collins to the Mayfair Hotel. Gilliland described the subsequent events as follows:

> "... We approached the desk, the night clerk, and asked him if there was a party by the name of Joey L. Stoner living at the hotel. He checked his records and stated, 'Yes, there is.' And we asked him what room he was in. He stated he was in Room 404 but he was out at this time.
>
> "We asked him how he knew that he was out. He stated that the hotel regulations required that the key to the room would be placed in the mail box each time

[4] "... [T]he unannounced entry of the Ker apartment occurred after dark, and such timing appears to be common police practice, at least in California." *Ker* v. *California*, 374 U.S. 23, 52 (1963) (opinion of Brennan, J.).

they left the hotel. The key was in the mail box, that he therefore knew he was out of the room.

"We asked him if he would give us permission to enter the room, explaining our reasons for this.

"Q. What reasons did you explain to the clerk?

"A. We explained that we were there to make an arrest of a man who had possibly committed a robbery in the City of Monrovia, and that we were concerned about the fact that he had a weapon. He stated, 'In this case, I will be more than happy to give you permission and I will take you directly to the room.'

. . . . . .

"We left one detective in the lobby, and Detective Oliver, Officer Collins, and myself, along with the night clerk, got on the elevator and proceeded to the fourth floor, and went to Room 404. The night clerk placed a key in the lock, unlocked the door, and says, 'Be my guest.'

"Q. What did you do?

"A. We entered the room, and the first thing that was observed was a pair of horn-rimmed glasses laying on a desk in the northeast corner of the room. I picked the glasses up and looked at them and noted that they answered the description of the glasses described by one of the victims.[8]

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[8] The description given to the police by Mr. Greely after the crime had been as follows: "I described him as 35 to 40 years old, I believe, five-ten, wearing a gray shirt, gray sweater and a gray hat, swarthy complexion. . . . Wearing glasses, excuse me; wearing horn-rimmed glasses" (R. 21).

Mrs. Ray stated: "I described him as wearing a gray jacket and hat and glasses, and I couldn't see his hair, and I couldn't see his eyebrows very well; and I said possibly I could see a moustache, the way the lights were shining on it" (R. 34).

Sometime during the period of investigation, the police asked Mrs. Ray and Mr. Greely to attempt to identify four persons that were brought by the police to the store, but they were unable to do so (R. 35).

"Q. I'm going to show you . . . People's Exhibit 3 for identification.

"A. Yes, sir, that's the glasses.

"Q. Are these the glasses that you observed in the room?

"A. Yes, sir.

"Q. Did you attach any significance to the fact that these glasses—the fact of these glasses being in the room?

"A. Well, the fact that they were horn-rimmed glasses.

"Q. Had you received some sort of report from some person about horn-rimmed glasses?

"A. Yes, one of the victims in the robbery had stated that the suspect who had the gun in his hand also wore horn-rimmed glasses.

"Q. What else did you do?

"A. Then began a systematic search of the room and noted that certain clothing in the room was along the same description as given by the victim or the victims; and during the check of the bureau, Officer Collins pulled the drawers from the bureau to check them. The bottom drawer, when he pulled it completely out we observed a gun lying on the floor, which is the gun which is now—

"Q. Is that People's Exhibit 1?

"A. People's Exhibit 1, I believe. And alongside of this gun was a—some toilet paper, white toilet paper which we unwrapped and it showed a number of cartridges for a .45 automatic.

. . . . . .

"Q. Was there anything else discovered in the room?

"A. There was certain address books and other miscellaneous evidence that was obtained, yes.

. . . . . .

"Q. Now, with reference to . . . . the coat, People's Exhibit 4 for identification; did you recover that from the room?

"A. It was taken from the room, yes.

"Q. What else occurred after the search?

"A. Well, at this time we determined that this would be the suspect in our particular robbery and we maintained an observation of the room or in the room, my partner and myself, until approximately noon the following day, which was the 28th of October" (R. 71-74).

Thus the officers, who had arrived at about 11 p.m. on the 27th of October, remained until about noon the next day; but petitioner did not return to the hotel and consequently they left (R. 74, 76).

Petitioner was arrested at about noon on October 29th—37 hours after the search of his hotel room—in Las Vegas, Nevada. While it is not clear who apprehended him, it was not Gilliland (R. 79, 94). It appears that Gilliland and Collins went to Las Vegas after petitioner was arrested and brought him back to California (R. 77, 79, 82).

In sum, without a search or arrest warrant, the officers entered petitioner's locked room in his absence and without his permission, conducted a "systematic search" down to the pulling out of bureau drawers, seized incriminating evidence, and thereupon "determined that this would be the suspect." Petitioner was arrested 37 hours later in another state. Despite petitioner's vigorous objection that the search and seizure had been unlawful (R. 66, 75), the trial judge ruled—without explanation—that they had not been, and consequently admitted into evidence the gun, the glasses, the jacket, and the cartridges and clip, and permitted the officers to testify before the jury as to where these items had been found (R. 75-76, 98).

On appeal to the District Court of Appeal of California, the judgment of conviction was affirmed. 205 Cal. App. 2d 108 (R. 121). As to the issue at hand, the court held that the search and seizure were lawful because incident to a valid arrest. The court reasoned that the officers had had probable cause to arrest petitioner prior to their entry into the hotel room; that they were not obliged to accept as true the clerk's statement that petitioner was not in his room; that "it may be reasonably inferred that they entered his room for the purpose of making an arrest"; that their observation of the glasses in plain sight reasonably led them to a further search; and that in the circumstances the arrest and the search and seizure were "part of the same transaction." The court concluded:

> "'. . . Moreover, it is quite clear that under the cases discussed above [all state cases] there would be no question about the search being incidental to an arrest if the defendant had returned to his room shortly after the officers had arrived and they had arrested him there. It would be unsound to hold that defendant, by his action in going to Las Vegas and not returning to his room and making himself available for arrest, could invalidate an otherwise lawful search. . . .'" *Id.*, at 113.

The Supreme Court of California refused to review the judgment of the District Court of Appeal (R. 130).

This Court granted petitioner's motion for leave to proceed *in forma pauperis*, granted the petition for writ of *certiorari* but limited review "to the question of whether evidence was admitted which had been obtained by an unlawful search and seizure," and appointed counsel (R. 131). 374 U.S. 826; 37– U.S. —— (32 U.S. Law Wk. 3137).

Summary of Argument

1. Under *Mapp* v. *Ohio*, 367 U.S. 643 (1961), and *Ker* v. *California*, 374 U.S. 23 (1963), the sole question is whether the search and seizure met the standards established by the Fourth Amendment, as it has been interpreted by this Court.

2. The search and seizure problems that have provoked controversy in this Court in the past are not involved here. This case may be disposed of under standards firmly established by this Court's prior decisions.

The lower court decision is squarely contrary to *Agnello* v. *United States*, 269 U.S. 20 (1925). There the Court held unconstitutional a search of the suspect's home that was made shortly after the arrest but at a place several blocks removed from the point of arrest. The rule established by *Agnello*—that for a search to be valid as incident to arrest the two events must occur at substantially the same time and in substantially the same place—has never been questioned in this Court and has been followed by the lower federal courts. A search 37 hours before the arrest and in a different state cannot satisfy this requirement.

Moreover, there are additional standards of reasonableness well grounded in this Court's decisions, including *Harris* v. *United States*, 331 U.S. 145 (1947), and *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), which set the outer limits for this type of search and seizure; and the search and seizure in the case at bar do not measure up to any of these standards.

Thus, in the first place, the glasses and jacket that were seized were neither the means or instrumentalities of committing crime, fruits of crime, means for effecting an escape, nor illegally held in any respect. Consequently, they

could not be the subject of a search or a seizure, with or without a warrant. *Boyd* v. *United States,* 116 U.S. 616 (1886); cases cited *infra,* pp. 27-28.

Second, the search became illegal the moment the officers entered the locked room, for they did so without permission, without any warrant, and with no reason to believe petitioner was there or that a crime was being committed in the room. *Morrison* v. *United States,* 262 F.2d 449 (D.C. Cir. 1958); *Raniele* v. *United States,* 35 F.2d 877 (8th Cir. 1929); cases cited *infra* pp. 31-37; cf. *Ker* v. *California,* 374 U.S. 23 (1963).

Third, no crime was committed in the officers' presence at the time of arrest, and many decisions, including *Harris* (331 U.S., at 155) and *Rabinowitz* (339 U.S., at 66), indicate this circumstance is significant in assessing the legality of a search incident to arrest.

Fourth, there is no showing that the officers did not have time to get warrants, and this factor, while not controlling, is relevant even after *Rabinowitz. Rent* v. *United States,* 209 F.2d 893, 899 (5th Cir. 1954).

Fifth, there is not sufficient support in the record for the view that the officers intended to arrest rather than to search when they entered the room. While they may have had probable cause to arrest and while they told the room clerk they intended to arrest, at the same time they did not get an arrest warrant and Gilliland testified that they determined petitioner was the suspect *after* the search. The ambiguity should be resolved against the state, since it carries the burden of justifying the exemption from the warrant requirement. *United States* v. *Jeffers,* 342 U.S. 48, 51 (1951). And if the purpose was to search, the search and seizure without a warrant were illegal under well-established principles. *United States* v. *Jeffers, supra;*

Taylor v. *United States*, 286 U.S. 1 (1932); *Johnson* v. *United States*, 333 U.S. 10 (1948); *Chapman* v. *United States*, 365 U.S. 610 (1961); *Jones* v. *United States*, 357 U.S. 493 (1958).

3. While the case may be disposed of upon the basis of this Court's prior decisions without impairing the authority of any of them, we respectfully suggest that the Court consider whether the most appropriate method of resolving the problems raised in this case might not be the overruling of *Harris* and *Rabinowitz*. As to the merits of those decisions, we rely upon the arguments advanced in the dissenting opinions; and as to the wisdom of overruling them, we rely upon the case at bar as a demonstration of their unfortunate consequences in the lower courts.

ARGUMENT

I.

Introductory Comments.

It is now settled that under *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the state courts are obliged by the Fourteenth Amendment to the Constitution of the United States to exclude in criminal trials any evidence that has been secured in violation of the standards of the Fourth Amendment. *Ker* v. *California*, 374 U.S. 23 (1963). In consequence, the issue raised in this case must be disposed of by application of the decisions of this Court dealing with the legality under the Fourth Amendment of searches and seizures in the absence of a warrant.*

* It perhaps should be noted specifically that this case raises no problem of retroactive application of *Mapp*. In the first place, the case is here on direct review, so that enforcement of the exclusionary rule could not be more retroactive than in *Mapp* itself. Moreover, while the trial in the case was held before the decision

While the rule of *Mapp* and *Ker* avoids the necessity of elaboration of a new body of constitutional search and seizure law to be applied to the states by way of the exclusionary rule, two broad problems remain. The first, which is unique to state proceedings, is that the Court in *Ker* made it plain that federal court decisions grounded upon rules of evidence rather than upon the command of the Fourth Amendment are not to be the basis for excluding evidence in state courts. However, while in some areas it may prove difficult to differentiate between the constitutional and the non-constitutional bases of prior decisions, in the case at bar our argument is grounded wholly upon precedent which is unquestionably constitutional in derivation.

The second problem, which is not unique to state court proceedings but which since *Mapp* is raised in that context for the first time, is that the prior decisions of this Court relating to the Fourth Amendment do not fall into a clear pattern. And this is especially true of the cases involving the right of law enforcement officers to search and seize incident to arrests. As the Court itself has noted, "[T]he

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in *Mapp*, the District Court of Appeal decision of June 26, 1962 (R. 121), came a full year after *Mapp*. Thus the situation is precisely the same as it was in *Ker*. See lower court opinion in *Ker*, 195 Cal. App. 2d 246, 15 Cal. Rptr. 767 (Aug. 29, 1961), and trial court judgment, set forth in Record in this Court, p. 9 (Dec. 9, 1960). It may also be observed that even at the time of the trial the judge was required to consider the reasonableness of the search under both state and federal constitutions because of the California exclusionary rule. *People* v. *Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955). And there was no indication by the trial court that in its view the federal decisions relevant to the issue here raised involved the type of "needless refinements and distinctions" which under *Cahan* did not have to be enforced by way of exclusion of evidence. *Id.*, at 450, 282 P.2d, at 915.

As a point of interest, though not of relevance, it may be noted that Article I, section 19 of the California Constitution is identical to the Fourth Amendment.

cases in this Court dealing with the extent of the search which may properly be made without a warrant following a lawful arrest for crime . . . cannot be satisfactorily reconciled." *Abel* v. *United States*, 362 U.S. 217, 235 (1960). As we shall demonstrate, however, disposition of the issue raised in this case does not require any such reconciliation, for the search and seizure here involved violated Fourth Amendment requirements whether measured by the more permissive or the more restrictive of this Court's decisions.

II.

The Search and Seizure Were Invalid Under Standards Firmly Established by Prior Decisions of This Court.

A. *Background of the "Incident to Arrest" Doctrine.*

Both because this case can be dealt with on the basis of principles which run through every search and seizure case ever decided by this Court, and also because the Court is thoroughly familiar with the evolution of the "search incident to arrest" doctrine, there is no occasion for us to discuss in detail the development of that doctrine. However, because "where one comes out on a case depends on where one goes in," *United States* v. *Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting), a few remarks as to the doctrinal context in which this case arises may be in order.

Three propositions, we take it, have never been challenged in any opinion of this Court and require no citation for support. First, the general rule established by the Fourth Amendment is that the invasion of privacy represented by an official search or seizure should normally be sanctioned by a warrant issued by an independent magistrate who stands between the police and the citizen. Second, that general rule is subject to certain exceptions, one of

which is the right to search and seize incident to a valid arrest. And third, that right extends at least to a search of the person of the accused and things in his immediate physical control.

Disagreement has arisen, however, respecting the scope of the search and seizure that may be permissible beyond the person of the individual arrested. Until the decision in *Harris* v. *United States*, 331 U.S. 145 (1947), the holdings of this Court had sanctioned no such right to search and seize except the right to seize articles in plain sight at the time of arrest and the right, even prior to arrest, to search moving vehicles upon probable cause to believe they contained contraband. See, e.g., *Gouled* v. *United States*, 255 U.S. 298 (1921); *Agnello* v. *United States*, 269 U.S. 20 (1925); *Carroll* v. *United States*, 267 U.S. 132 (1925); *Go-Bart Co.* v. *United States*, 282 U.S. 344 (1931); *United States* v. *Lefkowitz*, 285 U.S. 452 (1932); but cf. *Agnello* v. *United States*, *supra*, at 30 (*dictum*); *Marron* v. *United States*, 275 U.S. 192 (1927) (explained in *Go-Bart Co.* v. *United States*, *supra*, at 358, and in *United States* v. *Lefkowitz*, *supra*, at 465).

In *Harris*, however, the Court, in a 5-4 decision, held that a warrant-less search of a four-room apartment immediately after arrest was within the incident to arrest exception; and this holding was reaffirmed by a 5-3 decision in *United States* v. *Rabinowitz*, 339 U.S. 56 (1950).

Thus, accepting the continued validity of *Harris* and *Rabinowitz* for present purposes (about which we shall say more later), the question is whether the search in the case at bar falls within the exception recognized by those decisions.

B. *Theory of the State Court Decision.*

While certain factual inferences drawn by the state appellate court are most doubtful, granting for the moment their correctness, the theory of the decision, conservatively stated, comes to this: If police officers have probable cause to arrest and actually set out to arrest rather than to secure evidence, they are at liberty, though without any warrant, to enter the suspect's locked home; and even though he is absent, they are nonetheless free to search the premises thoroughly to uncover evidence of his guilt and to seize it once it is found. Nor does it matter that he is not arrested for days or that he is arrested hundreds of miles away, as long as it was possible at the time of the search that he would return shortly and be arrested in his home.

This decision is but one step removed from the total obliteration of the safeguards of the Fourth Amendment. In place of the requirement that the intrusion into the home be sanctioned by a magistrate upon a sworn showing that there is good reason to believe that particular property is in a particular place and that the state has the right to seize it, there is only the requirement that the police officer have probable cause to arrest. This alone authorizes him to break into any place where the suspect may be and to ransack it for evidence of the suspect's guilt. The only barrier left standing is the prohibition against the search that is designed to secure evidence to arrest—a protection of doubtful value, grounded as it is in an appraisal of the motives of the officer.

C. *The State Court Decision Is Contrary to* Agnello v. United States.

Such an effort to expand the "incident to arrest" exception so that it would become the rule was squarely re-

jected by this Court in *Agnello* v. *United States*, 269 U.S. 20 (1925). In *Agnello*, federal officers observed through a window a sale of narcotics and thereupon entered the house and arrested the persons involved. Immediately prior to the offense, the officers had followed one of those arrested from the site of the sale to two other addresses, and it appeared that the narcotics had been secured at one of those places. Consequently, while some agents took those arrested to the station, the others went to the other addresses, searched, and seized narcotics.

The government's argument in this Court was narrower than the position adopted in the case at bar by the lower court, but it depended fundamentally upon the same notion, *i.e.*, that probable cause for an arrest affords sufficient protection so that search warrant requirements may be dispensed with. As the government put it: "It is submitted that *where an officer may arrest without warrant*, he may also *at that same time* search without warrant in any place *in the immediate vicinity* where it is clearly indicated that the instruments of the crime (not evidence merely) are hidden." *Id.*, at 25 (emphasis supplied).

This Court replied:

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. . . . But the right does not extend to other places. Frank Agnello's house was several blocks distant from Alba's house, where the arrest was made. When it was entered and searched, the conspiracy was ended and the defendants were under arrest and in custody else-

where. That search cannot be sustained as an incident to the arrests." *Id.*, at 30-31.

In so holding, the Court was applying the principle established earlier in *Weeks* v. *United States*, 232 U.S. 383 (1914), and in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920). In *Weeks*, a federal marshal searched the home of a person who had been arrested by local officers earlier in the day at his place of employment and seized materials that were later introduced at the trial. In ruling that the search and seizure violated the Fourth Amendment, the Court stated:

> "The case . . . involves the right of a court to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of his premises. . . . The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the thing for which the search was to be made. . . . " 232 U.S., at 393.

And in *Silverthorne*, the Court condemned as "without a shadow of authority" a search of defendants' office that was made after they were arrested in their homes and while they were detained. 251 U.S., at 390.

While some members of the Court in subsequent cases thought the *Agnello dictum* as to what "is not to be doubted" about the type of search and seizure which may be made incident to an arrest went too far, see *Harris* v. *United States*, 331 U.S. 145, 155, 183, 195 (1947) (dissenting opinions); *United States* v. *Rabinowitz*, 339 U.S. 56, 68 (1950)

(dissenting opinion); *Davis* v. *United States*, 328 U.S. 582, 594, 623 (1946) (dissenting opinions); *Zap* v. *United States*, 328 U.S. 624, 630 (1946) (dissenting opinion), the *Agnello* holding as to what may *not* be searched—a house substantially removed geographically from the place of arrest at a time not substantially contemporaneous with the arrest—has never been questioned in any subsequent opinion in this Court.[7]

D. *The* Agnello *Holding Has Been Consistently Followed by the Lower Courts.*

While there have been disagreements in the lower federal courts over the permissible scope of a search and seizure incident to arrest, the *Agnello* holding has been well beyond the area of dispute. To put it differently, a long line of lower federal court decisions is wholly at odds with the state court holding in the case at bar.

A good example is a recent decision by the Court of Appeals for the Ninth Circuit, *Mosco* v. *United States*, 301 F.2d 180 (1962). There, after investigation of a robbery, the officers went to the suspect's apartment to arrest him. After receiving no response to their knock, they entered the apartment through the aid of the landlord. In looking through the apartment to verify that the suspect was not there, they found one of the items later introduced into evidence. The suspect returned about a half an hour later and was placed under arrest. The court held that, whatever may be the rule as to whether the arrest must

[7] For a recent indication by the Court of the continued vitality of the *Agnello* doctrine, see *Ker* v. *California*, 374 U.S. 23, 42 n. 13 (1963) ("In cases in which a search could not be regarded as incident to arrest because the petitioner was not present at the time of the entry and search, the absence of compelling circumstances . . . supported the Court's holdings that searches without warrants were unconstitutional."). See also *Lustig* v. *United States*, 338 U.S. 74, 79-80 (1949).

precede the search where the person is available for arrest, the federal rule "does not sanction a search made before the individual is available for arrest." The court observed:

> "In this particular case, moreover, it was a pure coincidence that Mosco appeared at his apartment within a few minutes after the search. . . .
>
> "If it had turned out that Mosco was arrested somewhere else, or arrested at his apartment the following week, it could not have been said that the search which uncovered Exhibit C was incident to the arrest." *Id.*, at 188.

For similar decisions, see, e.g., *Hershkowitz* v. *United States*, 65 F.2d 920 (6th Cir. 1933) (search of house after arrest outside house held illegal); *Papani* v. *United States*, 84 F.2d 160, 163 (9th Cir. 1936) (search in basement followed in a few minutes by arrest upstairs illegal because "the search was not made at the place of arrest." "[I]t would seem that a search is not incidental to the arrest, unless the search is made at the place of arrest, contemporaneously with the arrest."); *United States* v. *Lee*, 83 F.2d 195, 196 (2d Cir. 1936) ("Appellant was not arrested at the time of the search. The search here could not be justified as an incident to a lawful arrest. . . ."); *United States* v. *Stappenback*, 61 F.2d 955 (2d Cir. 1932) (held illegal a search of building where the arrest had taken place earlier in the day just outside the building); *Hurst* v. *State of California*, 211 F.Supp. 387, 392 (N.D. Cal. 1962) (*habeas corpus* relief granted from state conviction after *Mapp;* alternative holding that search was illegal because it preceded arrest—"The law requires . . . that an arrest be made *prior* to any search of a defendant or of the area under his possession or control, in order that such search be considered as incident to the arrest."); *United*

States v. *Royster*, 204 F.Supp. 760, 762 (N.D. Ohio 1961) ("The Government contends, however, that 'It is irrelevant that the police did not actually arrest Royster prior to searching him so long as probable cause for the arrest existed.' . ... This cannot be done."); *United States* v. *Rutheiser*, 203 F.Supp. 891, 892 (S.D.N.Y. 1962) ("[T]he search took place some three and one-half hours prior to the arrest. It is thus hard to argue that the search was incidental to a lawful arrest."); *United States* v. *Steck*, 19 F.2d 161, 162 (W.D. Pa. 1927) ("[O]fficers making an arrest at a place other than the home are not entitled thereafter to enter and search the home."); *United States* v. *Swan*, 15 F.2d 598, 599 (N.D. Cal. 1926) (search of house followed in one-half hour by arrest upon return of defendant held illegal—"[T]he search was in no sense incidental to an arrest, and moreover was entirely completed before any arrest was made."); *United States* v. *Vallos*, 17 F.2d 390, 392 (D. Wyo. 1926) ("The difficulty in the case at bar, so far as the government's contention is concerned, is that no arrest of the defendant was made at the time or at the place where the search was conducted, so that the validity of the search in this case cannot be based upon the arrest of the defendant."); *United States* v. *Fowler*, 17 F.R.D. 499, 501 (S.D. Cal. 1955) ("Where, as here, officers drive an accused two blocks from the place of arrest to the apartment searched, there is an absence of the element of reasonableness which is required to make the search an incident to the arrest."). See also *Trupiano* v. *United States*, 334 U.S. 699, 707-708 (1948) ("But Antoniole might well have been outside the building. If . . . he had been arrested in the farmyard, the entire argument advanced by the Government in support of the seizure without warrant would collapse.") (overruled in other respects by *Rabinowitz*); Mr. Justice Frankfurter, dissenting in *Harris* v. *United States*, 331 U.S., at 164 ("It would hardly be sug-

gested that such a search could be made without warrant if Harris had been arrested on the street."); Judge Learned Hand in *United States* v. *Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926) ("[B]y hypothesis the power [to search] would not exist, if the supposed offender were not found on the premises. . . .").

To be sure, the application of the *Agnello* principle raises problems of judgment in close cases. Compare, e.g., *Hobson* v. *United States*, 226 F.2d 890, 892 (8th Cir. 1955) ("At the time of the break-in Regina was downstairs near the door. . . . There is no justification in this record for a search of the entire house. . . . "), and *Drayton* v. *United States*, 205 F.2d 35 (5th Cir. 1953) (held illegal a search in upstairs room of rooming house after arrest downstairs), with *Kelley* v. *United States*, 61 F.2d 843, 847 (8th Cir. 1932) (upheld search of barn after arrest outside), and *Safarik* v. *United States*, 62 F.2d 892, 896 (8th Cir. 1933) (The officer could search "the place where [the suspect] is discovered and other places in the immediate vicinity which are clearly indicated as having formed a part of the scene of the crime.").

But, so far as we have discovered, there has been no deviation from the rule that the search must be substantially contemporaneous with the arrest and must not extend beyond the immediate vicinity of the arrest, however those terms may be defined in particular cases. And there can be no genuine doubt that, under this principle, the search and seizure in the case at bar violated the standards of the Fourth Amendment.[8]

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[8] In this case, as in *Ker* v. *California*, 374 U.S. 23, 43 (1963), there is no need to choose between the California rule that the search may precede the arrest as long as there was independent probable cause for the arrest, e.g., *Willson* v. *Superior Court*, 46

E. *The Decisions in* Harris v. United States *and* United States v. Rabinowitz *Fortify the Conclusion That the Search and Seizure Were Invalid.*

The flagrant unconstitutionality of the search and seizure in the case at bar is underscored by the fact that the decisions in *Harris* v. *United States*, 331 U.S. 145 (1947), and *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), which the Court has described as setting "by far the most permissive limits" for searches incident to arrest, *Abel* v. *United States*, 362 U.S. 217, 235 (1960), fortify petitioner's argument.

In *Harris* and *Rabinowitz*, the Court ruled that the right of search and seizure incident to an arrest extends beyond the person of the individual arrested and subjects within his actual physical control. In so doing, the Court established a broad "rule of reason" for Fourth Amendment decisions. "[S]uch searches turn upon the reasonableness under all the circumstances. . . . " *Rabinowitz* v. *United*

Cal.2d 291, 294 P.2d 36 (1956); *People* v. *Simon*, 45 Cal.2d 645, 290 P. 2d 531 (1955), and what appears to be the federal rule that the search must invariably follow the arrest. See discussion and cases cited in *Mosco* v. *United States*, 301 F.2d 180 (9th Cir. 1962), and in *Hurst* v. *State of California*, 211 F.Supp. 387 (N.D.Cal. 1962), in both of which the California rule was rejected. Whether the so-called federal rule should be adopted so as to insure that the search is truly incident to the arrest rather than the arrest's being a pretext for the search, or whether a more flexible standard should control, there is no resemblance between the case at bar and the typical case in which that issue arises where the time elapsing between the arrest and the search is relatively brief.

It has been observed, however, that in its more extreme manifestations the California doctrine is inconsistent with *Agnello*. Comment, *The Cahan Case: The Interpretation and Operation of the Exclusionary Rule in California*, 4 U.C.L.A. L.Rev. 252, 267 (1957). For an example almost as striking as the case at bar, see *People* v. *Dominquez*, 300 P.2d 194 (Cal. App. 1956), where the court, relying upon *Rabinowitz*, unaccountably read that case as involving a search five days after the arrest.

States, supra, at 65-66.[9] As we have indicated, nothing in those opinions intimates that the time and place requirements upon which *Agnello* turned were to be discarded. Rather, it is evident, as the lower court decisions cited above which followed *Harris* and *Rabinowitz* indicate, that those requirements are to be considered as essential ingredients of Fourth Amendment reasonableness under the *Harris-Rabinowitz* approach.

But *Harris* and *Rabinowitz* plainly indicate that, even if the time and place requirements of *Agnello* are met, a search and seizure may nonetheless be unconstitutional because there are additional elements of the Fourth Amendment "rule of reason," elements firmly rooted in the federal law of search and seizure. If the case at bar is analyzed in terms of these factors, the error in the lower court opinion becomes even more evident.

1. *Character of the items seized.* This Court has long recognized that a search or seizure, to be valid under the Fourth Amendment, must have as its object things which are not "merely evidentiary" but which, for one reason or another, the government has a right to appropriate.

This distinction was the basis for decision in the first significant search and seizure case to be decided by this Court, *Boyd* v. *United States,* 116 U.S. 616 (1886), "a case that will be remembered as long as civil liberty lives in the United States" (Brandeis, *J.*, dissenting in *Olmstead* v. *United States,* 277 U.S. 438, 474 (1928)). The question in *Boyd* was whether in a forfeiture proceeding a person could, consistently with the Fourth and Fifth Amendments, be

[9] Of course, the Court had always viewed Fourth Amendment cases as raising questions of reasonableness; but it was the dissenters' argument in *Harris* that the term "unreasonable" in the Amendment did not call for an *ad hoc* determination in search incident to arrest cases, but rather that as an historical matter a search beyond the person and objects under his actual physical control is unreasonable in the absence of a warrant.

compelled to produce certain documents at pain of having the government's allegations taken as confessed. The Court held that such action was forbidden by both the Fourth and Fifth Amendments, stating:

> "...The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not." 116 U.S., at 623.

The Court's holding was based upon an extensive consideration of the historical background of the Fourth Amendment. Thus, for example, the Court observed that "[e]ven the act under which the obnoxious writs of assistance were issued [footnote omitted] did not go as far as this, but only authorized the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid. . . ." *Ibid.* And in *Entick* v. *Carrington*, 19 Howell's St. Tr. 1029 (1765), a decision "considered as one of the landmarks of English liberty," 116 U.S., at 626, Lord Camden ruled illegal a general search warrant that had been used as the basis for examining plaintiff's papers, stating:

> "... [I]t bears a resemblance, as was urged, to the known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one, I am permitted to seize my own goods. . . . In the other, the party's own property is seized before and without conviction. ...
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> • • • • • •

> "Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. . . . " Quoted at 116 U.S., pp. 628, 629.

This view that a search or seizure, with or without a warrant, is unreasonable under the Fourth Amendment if designed simply to secure evidence has persisted with undiminished vitality in this Court's decisions. See *Gouled* v. *United States*, 255 U.S. 298, 309 (1921); *Agnello* v. *United States*, 269 U.S. 20, 30 (1925); *Carroll* v. *United States*, 267 U.S. 132, 158 (1925); *Marron* v. *United States*, 275 U.S. 192, 198-199 (1927); *United States* v. *Lefkowitz*, 285 U.S. 452, 465-466 (1932); cf. *Go-Bart Co.* v. *United States*, 282 U.S. 344 (1931); *Davis* v. *United States*, 328 U.S. 582, 603-604 (1946) (dissenting opinion); *Zap* v. *United States*, 328 U.S. 624, 632-633 (1946) (dissenting opinion).

Nor did *Harris* or *Rabinowitz* impair this principle. The items that had been seized in *Harris* were selective service cards, and the crime charged was unlawful possession, concealment, and alteration of such cards. The Court held that the seizure was proper, observing:

> " . . . This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the prisoner arrested

might be effected, and property the possession of which is a crime." 331 U.S., at 154 [footnote omitted].

Similarly, in *Rabinowitz* the items seized were forged stamps, and the Court noted that possessing them was illegal and that they had been used in committing the crime and were therefore to be distinguished from merely evidentiary materials. 339 U.S., at 64 n. 6.

Moreover, as recently as *Abel* v. *United States*, 362 U.S. 217, 237-239 (1960), this Court has tested the constitutionality of a seizure in terms of the *Boyd* principles.[10]

In the case at bar, while the gun and cartridges that were seized were unquestionably proper subjects of search and seizure, the glasses and jacket clearly were not. There is nothing to indicate that they were unusual in any respect so as to constitute a disguise; and, absent any question of disguise, if the clothing a person wears while committing a crime could be considered a means or instrumentality of committing it, it is hard to see what substance the *Boyd* rule would retain. See, e.g., *Morrison* v. *United States*,

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[10] The lower federal courts have consistently applied the *Boyd* rule. E.g., *Bushouse* v. *United States*, 67 F.2d 843 (6th Cir. 1933); *In Re No. 191 Front Street*, 5 F.2d 282 (2d Cir. 1924); *Freeman* v. *United States*, 160 F.2d 72 (9th Cir. 1947); *In Re Ginsburg*, 147 F.2d 749 (2d Cir. 1945); *Gilbert* v. *United States*, 291 F.2d 586 (9th Cir. 1961), *rev'd on other grounds*, 370 U.S. 650; *Honeycutt* v. *United States*, 277 Fed. 939 (4th Cir. 1921); *Morrison* v. *United States*, 262 F.2d 449 (D.C. Cir. 1958); *Takahashi* v. *United States*, 143 F.2d 118 (9th Cir. 1944); *Williams* v. *United States*, 263 F.2d 487 (D.C. Cir. 1959); *Woo Lai Chun* v. *United States*, 274 F.2d 708 (9th Cir. 1960); *United States* v. *Kirschenblatt*, 16 F.2d 202 (2d Cir. 1926); *United States* v. *Poller*, 43 F.2d 911 (2d Cir. 1930); *United States* v. *Thomason*, 113 F.2d 643 (7th Cir. 1940); *United States* v. *Lerner*, 100 F. Supp. 765 (N.D. Cal. 1951); *United States* v. *Richmond*, 57 F. Supp. 903 (S.D. W.Va. 1944); *United States* v. *Antonelli Fireworks Co.*, 53 F. Supp. 870 (W.D. N.Y. 1943). See, generally, Comment, 20 U. of Chi. L. Rev. 319 (1953).

262 F.2d 449 (D.C. Cir. 1958) (handkerchief that bore tangible evidence of offense not subject to seizure); *Williams* v. *United States*, 263 F.2d 487 (D.C. Cir. 1959) (coat useful as evidence not subject to seizure); *United States* v. *Richmond*, 57 F.Supp. 907 (S.D.W.Va. 1944) (testimony concerning clothing and floor covering not admissible).[11]

Although, as we have indicated, this Court has regarded the principle here discussed as deriving from the Constitution so that consideration of federal and state statutes is not necessary, it may be observed parenthetically that until 1957 in California a search warrant would issue only to seize the types of property falling within the *Boyd* rule, although in that year the statute was amended to permit warrants to issue for a search for evidence.[12] Thus the former California statutory law was in accord with

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[11] It may be noted that the *Boyd* rule may not apply so as to restrict a search or seizure of the *person* at the time of arrest. See *In Re No. 191 Front Street*, 5 F.2d 282, 285 (2d Cir. 1924); *United States* v. *Kirschenblatt*, 16 F.2d 202 (2d Cir. 1926). This may explain *Hess* v. *United States*, 254 F.2d 578 (8th Cir. 1958), which otherwise would be inconsistent with *Morrison*, *Williams*, and *Richmond*.

[12] Former section 1524 of the California Penal Code authorized warrants only to seize property which "was stolen or embezzled," or which was "used as the means of committing a felony," or which "is in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered," or certain other specified items belonging to another person.

In 1957, the statute was amended so as to permit search for any item which "constitutes any evidence which tends to show that a felony has been committed, or tends to show that a particular person has committed a felony." Cal. Stats. 1957, c. 1884, p. 3289, §1.

For other state statutes similar to former section 1524, see 1 Varen, Searches, Seizures, and Immunities 219-220 (1961).

Rule 41(b), Fed. R. Crim. P.,[13] as well as with the first federal general search warrant statute, 40 Stat. 228 (1917).[14] It may also be worth noting that the Los Angeles Chief of Police, in an affidavit submitted in connection with a petition for rehearing in *People* v. *Cahan*, 44 Cal. 434, 282 P.2d 905 (1955), the decision establishing the exclusionary rule in California, stated that a principal reason for not using the warrant procedure was to avoid these former restrictions in the California statute.[15] As Mr. Justice Jackson has said, "[the Court] must remember that the extent of any privilege of search and seizure without

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[13] "A warrant may be issued under this rule to search for and seize any property

"(1) Stolen or embezzled in violation of the laws of the United States; or

"(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

"(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C. §957."

[14] "A search warrant may be issued under this title upon either of the following grounds:

"1. When the property was stolen or embezzled in violation of a law of the United States; . . .

"2. When the property was used as the means of committing a felony; . . .

"3. When the property, or any paper, is possessed, controlled, or used in violation of section twenty-two of this title; . . ."

[15] He said:

"(4) Under Section 1524 of the Penal Code, a search under a warrant may not be made for evidence as such, but only for stolen property or for tools of a crime. . . .

"(6) Consequently, if evidence of the kind which cannot be sought under a warrant is to be obtained at all, it must be obtained without a warrant, and the test of the lawfulness of a quest for such evidence is its reasonableness. . . ." Quoted in Barrett, *Exclusion of Evidence Obtained by Illegal Searches —A Comment on People v. Cahan*, 43 Cal. L. Rev. 565, 570 n. 30 (1955).

warrant which [it] sustain[s], the officers interpret and apply themselves and will push to the limit." *Brinegar* v. *United States*, 338 U.S. 160, 182 (1949) (dissenting opinion).

2. *Authority for entry into room.* From *Boyd*, 116 U.S., at 630, to *Ker* v. *California*, 374 U.S. 23 (1963), this Court has recognized that the legality of the entry into a home is an important circumstance in judging the constitutionality of an ensuing search and seizure. Indeed, until *Ker* the Court had not sanctioned a search of a home incident to arrest in any case in which neither an arrest warrant nor a search warrant had been issued.[16]

Thus, in *Gouled* v. *United States*, 255 U.S. 298, 306 (1921), where an agent had gained access to an office by pretending to make a friendly call and in the defendant's absence had seized several documents, the Court held that there had been a violation of the Fourth Amendment, stating:

> " . . . [W]hether entrance to the home or office of a person suspected of crime be obtained by . . . stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment. . . . "

In *Go-Bart Co.* v. *United States*, 282 U.S. 344, 358 (1931), the Court emphasized that the "lawless invasion of the premises" had been committed without a valid warrant of any kind; and in *United States* v. *Lefkowitz*, 285 U.S. 452,

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[16] See the discussion of the significance of an arrest warrant in connection with incidental search in Mr. Justice Brennan's dissenting opinion in *Abel* v. *United States*, 362 U.S. 217, 249 (1960).

In California, an arrest without a warrant is authorized where the officers have reasonable cause to believe that the suspect has committed a felony. Cal. Penal Code, §836(3).

465 (1932), where the search incident to arrest was held illegal, the Court distinguished *Marron* v. *United States*, 275 U.S. 192 (1927), in part on the ground that there the officers had been "lawfully on the premises" by virtue of a valid search warrant. In *Trupiano* v. *United States*, 334 U.S. 699 (1948) (overruled by *Rabinowitz*), both the majority and the dissenters concurred as to the relevance of legality of entry. *Id.*, at 709, 712. And in *Johnson* v. *United States*, 333 U.S. 10 (1948), where the Court struck down a search because of the invalidity of the arrest, the Court stated: "An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in the law for the intrusion." *Id.*, at 17.

In *McDonald* v. *United States*, 335 U.S. 451, 459 (1948), where officers climbed through a window in order to ascertain whether a numbers racket was in operation, Mr. Justice Jackson's concurring opinion, in which Mr. Justice Frankfurter joined, emphasized the illegality of the entry, declaring that it was "a felony in law and a crime far more serious than the one they were engaged in suppressing." See also *Weeks* v. *United States*, 232 U.S. 383, 393-394 (1914); *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951) ("[T]heir intrusion was conducted surreptitiously and by means denounced as criminal."); *Miller* v. *United States*, 357 U.S. 301 (1958); *Chapman* v. *United States*, 365 U.S. 610, 616 (1961); *Silverman* v. *United States*, 365 U.S. 503 (1961); *Davis* v. *United States*, 328 U.S. 582, 623 (1946) (dissenting opinion); cf. *Irvine* v. *California*, 347 U.S. 128, 132 (1954).

Harris and *Rabinowitz* are fully in accord with this approach. In *Harris*, the Court noted, "Here the agents entered the apartment under the authority of lawful warrants of arrest. Neither was the entry tortious. . . ." 331 U.S., at 153. And in *Rabinowitz* not only had the

officers secured arrest warrants, but, as the Court pointed out, "[T]he place of the search was a business room to which the public, including the officers, was invited." 339 U.S., at 64.[17]

In the case at bar, the entry issue may be phrased as follows: Did the officers, as part of their effort to make an arrest, have the right, without any warrant and without petitioner's permission, to gain access to petitioner's room by unlocking the door, when so far as appears they did not believe he was in the room and when in fact he was not there? In so stating the question, it will be noted that we assume for the moment that the record establishes that the aim of the officers in entering was not to search but was rather to effect an arrest, perhaps by waiting for petitioner to return. The evidence as to this assumption is conflicting, and we discuss it in a later section of the brief. However, the suggestion of the lower court that the officers might not have believed the room clerk's statement that petitioner was not in the room, 205 Cal. App. 2d, at 113 (R. 126), has no support whatsoever in the record and should not be accepted. No officer so testified, nor was there any evidence from which such an inference could be drawn. For example, the officers did not state that they took any of the precautions that would have been normal had they thought an armed robber was in the room, nor did they testify that they followed the procedure specified by state law with respect to demanding admittance and explaining their mission.[18]

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[17] In *Rabinowitz*, however, the Court did indicate that absence of the warrant would not have been fatal. *Id.*, at 60.

[18] "To make an arrest, . . . in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which . . . [he has] reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired." Cal. Penal Code, §844.

While we have found no case in this Court squarely raising the question whether officers may, as part of an effort to arrest but without any warrant, enter a locked dwelling even though they have no cause to believe, and do not believe, the suspect is there, the strictness with which this Court has viewed entry without a warrant suggests that such a right probably does not exist, at least absent extraordinary circumstances.[19] In particular, this appears to be the implication of *Ker* v. *California*, 374 U.S. 23 (1963). In that case, all of the members of the Court, with the possible exception of Mr. Justice Harlan, appear to have shared the view that, as a matter of constitutional law, an arresting officer may not force entry into a home without first identifying himself, announcing his mission, and requesting admittance. The implication, we suggest, is that, at least in the absence of extraordinary circumstances, the householder is to be given the opportunity to consent to entry. Consequently, where consent cannot be obtained because no one is home, there can be no right to enter.

See also *Jones* v. *United States*, 357 U.S. 493, 499-500 (1958), where the Court did not reach what it characterized as the "grave constitutional question . . . whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment." Presumably the question would have been even graver if the officers had not had reasonable cause to believe the suspect was in the house, and the dissenting opinion contains no contrary

[19] While this issue is one of constitutional law, it may be noted that the California statute respecting the right to force entry to make an arrest, quoted *supra* note 18, carries the same implication by requiring that the person either be in the house or that the officer have "reasonable grounds for believing him to be" there.

implication. See, *id.*, at 503. ("There being probable cause here to believe that a felon was within the house, the entry of the officers was lawful, even though after a complete search the belief was found to be incorrect.") And see *Lustig* v. *United States*, 338 U.S. 74, 79 (1949).

A number of lower federal court decisions directly support petitioner's position as to the legality of the entry in this case. One of the decisions closest on its facts to the case at bar is *Morrison* v. *United States*, 262 F.2d 449 (D.C. Cir. 1958). There, officers set out to make an arrest; they were advised by a bystander that the suspect was in his house; they knocked at the door but received no response; they thereupon entered through an opening in the basement and searched the house for the suspect without success; and in the course of that search they seized certain incriminating evidence. Judge Prettyman, writing for the court, held the seizure unconstitutional because of the unconstitutionality of the entry.[20] So far as the case at bar is concerned, this holding is *a fortiori*, for here the officers did not even have any reason to believe petitioner would be in

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[20] The court assumed the officers had reason to believe the suspect was in the house, but stated:

"... But they had no personal knowledge that he was there ....

"The officers entered the house to make a search. It was, to be sure, a search for a person ... but it was a search .... It is true they intended to arrest him if they found him .... But the search was a factual prerequisite to an arrest; it was the first objective of the entry; the officers did in fact search the house ....

* * * * * *

"Morrison did not refuse admittance to the officers; he was not there. Under those conditions the basic principle of the rule governing searches and seizures comes into play .... A man's home is just as private when he is not there as when he is. Police officers cannot, without a warrant of any kind, walk into an unoccupied, unlocked private home and search it, either for property or for a person. ..." *Id.*, at 452, 453.

the room and, so far as the record indicates, did not think he was.

A number of other decisions support the *Morrison* approach. On the whole, the lower courts appear to have confined the right of entry without a warrant in order to arrest to situations where a felony is committed in the presence of the officer so that there is an urgent necessity to suppress the crime. See, e.g., *Cardinal* v. *United States*, 79 F.2d 825 (6th Cir. 1935); *Rocchia* v. *United States*, 78 F.2d 966 (9th Cir. 1935); *Smith* v. *United States*, 254 F.2d 751 (D.C. Cir. 1958); *United States* v. *Lee*, 83 F.2d 195 (2d Cir. 1936); *Rouda* v. *United States*, 10 F.2d 916 (2d Cir. 1926); *Lindsly* v. *United States*, 12 F.2d 771 (5th Cir., 1926).[21]

If commission of a felony in the presence of the officers is to be the touchstone, naturally the entry here was illegal, since petitioner was not even there to commit a crime. See *Raniele* v. *United States*, 34 F.2d 877 (8th Cir. 1929), where the court rejected the argument that entry was justified because a crime was being committed in the presence of the officers, stating:

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[21] For a detailed analysis of the relevant historical materials, see *Accarino* v. *United States*, 179 F.2d 456 (D.C. Cir. 1949), where the court held illegal a forced entry by officers who had probable cause to believe a gambling offense was being committed, because "from the early days of the common law the breaking of doors to make an arrest without a warrant was lawful only if necessary." *Id.*, at 464. Also, of course, Mr. Justice Brennan's opinion for the Court in *Miller* v. *United States*, 357 U.S. 301 (1958), and his opinion (dissenting in this respect) in *Ker* v. *California*, 374 U.S. 23, 46 (1963), sets forth a great deal of relevant historical data. See also cases cited in Annot., 5 A.L.R. 263, which opens with the statement: "It is well settled that a police officer or a private person may make a peaceable or forcible entry to search any premises without a search warrant, for the purpose of arresting one accused of felony, or guilty of breach of the peace or misdemeanor committed in his presence. *But the person making the search must have reasonable and just cause to believe the person he seeks to arrest is on the premises searched.*" (Emphasis added.)

"'. . . First, the smell [of fermenting mash] did not give the prohibition agent knowledge that any person was in the house or had possession or control of the fermenting mash. If the prohibition agent had entered the house and found no person there, but had seized the still, and the next day had found the owner of the house in town and had arrested him, it could hardly be claimed that the search and seizure were lawful. . . . The fact that the prohibition agent happened to find the owner in the house does not alter the case." *Id.*, at 879-880.

For similar cases, see *In Re Phoenix Cereal Beverage Co.*, 58 F.2d 953 (2d Cir. 1932) (no showing that the officers knew people were in building); *Staker* v. *United States*, 5 F.2d 312 (6th Cir. 1925) (same as *Raniele*); *Gibson* v. *United States*, 149 F.2d 381 (D.C. Cir. 1945) (illegal entry into third person's house in search of suspect who was not in house and apparently had no connection with it); *Gatewood* v. *United States*, 209 F.2d 789, 792 (D.C. Cir. 1953) (entry by deception into house of third person—"The illegality of the officers' action was aggravated by their inexcusable ignorance of the fact that the [suspect] was already in custody, and by the weakness of their reason for believing she was in Gatewood's apartment:"); cf. *McKnight* v. *United States*, 183 F.2d 977 (D.C. Cir. 1950) (could have arrested on street and therefore no need for forced entry); *Pong Ying* v. *United States*, 66 F.2d 67 (3d Cir. 1933).

In sum, decisions of this Court and of the lower federal courts support the conclusion that there was an unconstitutional search in this case at the moment of entry because the officers entered without permission and neither believed nor had reason to believe that petitioner would be found in the room.[22]

[22] We might add that our position does not depend upon the particular means used to gain entry. The interest to be protected

3. *No Crime Was Committed in the Presence of the Officers.* Both *Harris* and *Rabinowitz* indicate that the scope of the search and seizure properly attendant upon an arrest may depend in part upon whether a crime was committed in the presence of the arresting officers. 331 U.S., at 155; 339 U.S., at 64. As has been noted, this consideration has also been regarded by the lower federal courts as important in connection with the right of officers to enter a home without a warrant, which is simply another aspect of the broad problem of the reasonableness of searches and seiz-

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is that of privacy of the home, and the protection in the circumstances of this case should not turn upon whether the latch is on.

The situation may be different where the question is whether the officers have the right to force entry to arrest a person they believe or know is in the room. In such circumstances, some courts have suggested that there may be a distinction with respect to legality of entry depending upon whether the entry was forced or, in contrast, whether it was with some sort of permission or at least "peaceable." See, e.g., *Washington* v. *United States*, 263 F.2d 742 (D.C. Cir. 1959) (distinguishing *Morrison* v. *United States*, *supra*); *Smith* v. *United States*, 254 F.2d 751 (D.C. Cir. 1958); *Hopper* v. *United States*, 267 F.2d 904 (9th Cir. 1959).

Were the question of "breaking" important, we would argue that the turning of a lock amounts to a breaking. See *Keiningham* v. *United States*, 287 F.2d 126, 130 (D.C. Cir. 1960) (opening of unlocked door is a "breaking" within the meaning of 18 U.S.C. 3109, the federal "announcement" statute); Wilgus, *Arrest Without a Warrant*, 22 Mich. L.Rev. 798, 806 (1924) ("What constitutes 'breaking' seems to be the same as in burglary: lifting a latch, turning a door knob, unhooking a chain or hasp, removing a prop to, or pushing open, a closed door of entrance to the house . . . ."), and cases there cited; and cf. *Ker* v. *California*, 374 U.S. 23, 38 (1963).

Finally, we note that cases holding that a mere trespass does not render a subsequent search or seizure unconstitutional are not relevant. See e.g., *Hester* v. *United States*, 265 U.S. 57 (1924); *Koth* v. *United States*, 16 F.2d 59 (9th Cir. 1926); *Giacona* v. *United States*, 257 F.2d 450, 456 (5th Cir. 1958). The point of decisions like *Hester* is simply that where there is an intrusion upon someone else's property which is illegal as a matter of property law, but where the property itself is not protected by the Fourth Amendment, such as open farm land, whatever violation there is is not of the Constitution. Compare such cases with *Silverman* v. *United States*, 365 U.S. 505 (1961).

ures. The *Harris-Rabinowitz* suggestion that, apart from the legality of entry, the search and seizure may be illegal if not justified by the necessity of suppressing commission of a crime is solidly based on prior opinions of this Court and the lower federal courts. See *Agnello* v. *United States*, 269 U.S. 20, 30 (1925); *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357 (1931); *McDonald* v. *United States*, 335 U.S. 451, 462-463 (1948) (dissenting opinion); *Marron* v. *United States*, 275 U.S. 192, 198-199 (1927); *United States* v. *Lefkowitz*, 285 U.S. 452, 463, 465 (1932); *Catagrone* v. *United States*, 63 F.2d 931, 932 (8th Cir. 1933); *Gilbert* v. *United States*, 291 F.2d 586, 593 (9th Cir. 1961), *rev'd on other grounds*, 370 U.S. 650; *Johnson* v. *United States*, 270 F.2d 721, 723 (9th Cir. 1959); *United States* v. *Lee*, 308 F.2d 715, 717 (4th Cir. 1962); *Safarik* v. *United States*, 62 F.2d 892, 896 (8th Cir. 1933); *Sayers* v. *United States*, 2 F.2d 146, 147 (9th Cir. 1924); *Smith* v. *United States*, 254 F.2d 751, 754 (D.C. Cir. 1958).

While it is true that the "in the presence of" doctrine was given considerable elasticity in *Harris*, where the crime consisted of the possession of items about which the officers were ignorant until they came upon them in the course of the search,[23] there is no way the principle can be stretched far enough to apply in the case at bar.

4. *Summary.* These various factors relating to the reasonableness of a search and seizure may perhaps best be summarized by comparing the facts in this case to the facts as described by the Court in *Rabinowitz*, 339 U.S., at 64.

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[23] Compare *Harris* with *McBride* v. *United States*, 284 Fed. 416, 419 (5th Cir. 1922). ("Where an officer is apprised by any of his senses that a crime is being committed, it is being committed in his presence. . . ."); *United States* v. *Chodak*, 68 F.Supp. 455, 458 (D.Md. 1946); *Garske* v. *United States*, 1 F.2d 620, 623 (8th Cir. 1924). See also Wilgus, *Arrest Without a Warrant*, 22 Mich. L.Rev. 673, 679-684 (1924).

There the Court stated that its holding was based upon the following considerations:

> "(1) The search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime . . . "

"' . . . [T]he objects searched for and seized here, having been utilized in perpetrating a crime . . . were properly subject to seizure. Such objects are to be distinguished from merely evidentiary materials which may not be taken into custody. . . . '"

In the case at bar, the search and seizure were not incident to an arrest nor was the petitioner in immediate and complete control of the area searched, because petitioner was not present in the room but rather was arrested 37 hours later in another state; the place of search was not a business room, but rather was a hotel room to which the officers were decidedly not invited and into which their intrusion was illegal; the search did extend beyond a room used for unlawful purposes because the room was not used for such purposes at all; and the objects seized, except for the gun and the cartridges, were not means of committing a crime nor was possession of them a crime.

In these circumstances, the search and seizure are properly characterized as the type of general, exploratory search for evidence that, as this Court has repeatedly emphasized, was a principal target of the Fourth Amendment. See, e.g., *Boyd* v. *United States*, 116 U.S. 616, 625-629 (1886); *Weeks* v. *United States*, 232 U.S. 383, 393-394 (1914); *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357 (1931); *United States* v. *Lefkowitz*, 285 U.S. 452, 465 (1932); *Harris* v. *United*

States, 331 U.S. 145, 153 (1947); *United States* v. *Rabinowitz*, 339 U.S. 56, 62 (1950); *Kremen* v. *United States*, 353 U.S. 346 (1957); *Wong Sun* v. *United States*, 371 U.S. 471, 481 n. 9 (1963).[24] It is clear from the record that, as opposed to cases like *Harris* and *Rabinowitz*, this was not a situation in which the officers were seeking particular items for which they could have obtained a warrant. Rather, as in cases like *Go-Bart Co.*, *Lefkowitz*, and *Kremen*, the officers' "systematic search," as officer Gilliland described it (R. 72), was obviously designed simply to uncover whatever evidence there might be in the room.[25] It seems plain enough that the restrictions discussed in the preceding portions of this brief are designed to provide safeguards against just this type of search. Putting aside the question whether these requirements actually afford protection equivalent to that given by the terms of the Amendment when warrants are sought, surely where they are not met the search and seizure is unreasonable within the meaning of the Amendment.

F. *The Failure of Proof as to Inability to Secure a Warrant Is Relevant.*

While it is true that *Rabinowitz* held that "[t]o the extent that *Trupiano* v. *United States*, 334 U.S. 699 requires a search warrant solely on the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled," 339

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[24] For a good summary of the historical materials and for citations to secondary sources, see Reynard, *Freedom from Unreasonable Search and Seizure– A Second Class Constitutional Right?* 25 Ind. L.J. 259-277 (1950). And see generally Lasson, The History And Development Of The Fourth Amendment To The United States Constitution (1937).

[25] It may be noted that the evidence introduced at trial was not all that was seized, which included in addition "certain address books and other miscellaneous evidence" (Officer Gilliland, R. 73).

U.S., at 66, it does not follow that the failure to get a warrant is entirely irrelevant under the *Harris-Rabinowitz* approach. Rather, we suggest that this factor should still be considered as bearing upon reasonableness. Such an interpretation was given *Rabinowitz* in *Rent* v. *United States*, 209 F.2d 893, 899 (5th Cir. 1954), and in *Clay* v. *United States*, 239 F.2d 196, 204 (5th Cir. 1956). See also *Ker* v. *California*, 374 U.S. 23, 41 (1963) ("The practicability of obtaining a warrant is not the *controlling* factor. . . . " (emphasis supplied); *Baxter* v. *United States*, 188 F.2d 119, 120 (6th Cir. 1951).

In the case at bar, there was no showing that there was insufficient time to secure a warrant. The hotel was entered two days after commission of the crime; and, while there is no indication of how rapidly the police moved after securing a tentative identification of the suspect, there is no basis for a conclusion that one of the officers on the force could not have taken Gilliland's place in going to the hotel while Gilliland sought a warrant. Similarly, the officers were in the room for a full 13 hours, and no reason appears why matters could not have been arranged so that Gilliland could have used part of that time to secure a warrant before the "systematic search" was made.

G. *The Search and Seizure Were Illegal Because the Purpose Was to Search Rather Than to Arrest.*

To this point, we have assumed the correctness of the lower court's view that the police, in entering petitioner's room, intended to facilitate an arrest rather than to search. However, in point of fact the record is insufficient to sustain such an assumption. Supporting the lower court's conclusion are the considerations that the officers may have had probable cause to secure an arrest warrant and that Gilliland testified that he told the room clerk that they

"were there to make an arrest of a man who had possibly committed a robbery" (R. 72). Against this is the fact that the officers did *not* seek an arrest warrant (and there is nothing in the record to indicate that they did not have time); Gilliland's statement that "at this time [after the search] we determined that this would be the suspect in our particular robbery" (R. 74); and the fact that at no point did any officer testify directly that at the time of entry they intended to arrest (as opposed to testimony as to what they told the clerk) or that they did not intend to search.

While the record consequently is ambiguous as to the officers' intent, we submit that the ambiguity is to be resolved against the state, not against petitioner. "Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes . . . Only where incident to a valid arrest . . . or in 'exceptional circumstances' . . . may an exemption lie, *and then the burden is on those seeking the exemption to show the need for it* . . . ." *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951) (emphasis supplied).

If, then, the case be regarded as one in which the purpose of the officers was probably to make a search rather than to facilitate an arrest, *United States* v. *Jeffers, supra*, is controlling. There, acting on information that narcotics were hidden in a hotel room, officers entered with the assistance of the manager, searched, and seized narcotics. No one was in the room; the suspect was arrested the next day. The Court held the search and seizure unconstitutional on the ground that there had been neither consent to the entry nor exceptional circumstances justifying the failure to get a warrant, such as a probability of violence or the threat of imminent destruction or removal of the contraband. In the case at bar, just as in *Jeffers*, there could be

no such circumstances since petitioner was not even in the room.

The *Jeffers* decision is one of a series of decisions in this Court and in the lower federal courts requiring a search warrant if the object of the officers is search rather than arrest, except arguably in the type of exceptional circumstances referred to in *Jeffers*—circumstances, we may note, that neither this Court nor any lower federal court, so far as we have discovered, has found except in the case of moving vehicles. For decisions as dispositive as *Jeffers*, see *Chapman* v. *United States*, 365 U.S. 610 (1961); *Jones* v. *United States*, 357 U.S. 493 (1958); *Johnson* v. *United States*, 333 U.S. 10 (1948); and *Taylor* v. *United States*, 286 U.S. 1 (1932). See also, e.g., *Agnello* v. *United States*, 269 U.S. 20, 32-33 (1925) (*dictum*); *Brinegar* v. *United States*, 338 U.S. 160 (1949) (automobile); *Carroll* v. *United States*, 267 U.S. 132 (1925) (automobile); *Henry* v. *United States*, 361 U.S. 98, 104 (1959) (automobile); *Husty* v. *United States*, 282 U.S. 694 (1931) (automobile); *McDonald* v. *United States*, 335 U.S. 451 (1948); *United States* v. *Di Re*, 332 U.S. 581 (1948); *Henderson* v. *United States*, 12 F.2d 528 (4th Cir. 1926); *Lee* v. *United States*, 232 F.2d 354 (D.C. Cir. 1956); *Temperani* v. *United States*, 299 Fed. 365 (9th Cir. 1924); *McKnight* v. *United States*, 183 F.2d 977 (D.C. Cir. 1950); *Walker* v. *United States*, 225 F.2d 447 (5th Cir. 1955).

III.

The Harris and Rabinowitz Doctrines Should Be Overruled.

While we think it clear that this case can be disposed of without limiting the doctrines established in *Harris* and *Rabinowitz*, we nonetheless think it appropriate to request that the Court reconsider those decisions with respect to the scope of the search that may accompany an arrest.

In requesting this review, we are motivated by the following considerations: First, passages in some recent opinions of this Court suggest the existence of doubts as to whether *Harris* and *Rabinowitz* were correctly decided. See *Abel* v. *United States*, 362 U.S. 217, 235, 248-249 (1960); *Wong Sun* v. *United States*, 371 U.S. 471, 480 n. 8 (1963); *Ker* v. *California*, 374 U.S. 23, 41-42 (1963). Indeed, in *Chapman* v. *United States*, 365 U.S. 610, 618, 623, Mr. Justice Frankfurter, in concurring, and Mr. Justice Clark, in dissenting, were both of the view that the Court's decision was inconsistent with *Rabinowitz*.

Next, while we recognize that in normal circumstances the Court would not overrule a prior decision if the case could be disposed of in different fashion, it is far from clear that the issue here involved is a proper subject for this form of judicial restraint. Certainty as to the applicable rules is surely desirable for the officer who must make his search and seizure determinations on his beat. Moreover, it is difficult to see how additional experience under the existing rules can be of substantial benefit. The issue is not one of those broad questions that, if left to the workings of the political process for a time, may become easier of solution. If *Harris* and *Rabinowitz* were mistakes, the sore is festering, not healing, for it is plain enough that the incident to arrest "exception" is rapidly becoming the rule

and that search warrants are becoming a relic of the past. Thus, the investigation of one commentator has disclosed that "[a]s a matter of practice . . . search warrants are seldom used by the police. In populous Los Angeles County, for example, only 17 such warrants were issued in all of 1954." Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People* v. *Cahan*, 43 Cal. L. Rev. 565, 570 (1955).[26]

Finally, with all deference we submit that the decisions in *Harris* and *Rabinowitz* were in error. The arguments supporting our view are exhaustively set forth in the dissenting opinions in those cases, upon which we rely.[27] We wish only to make a few additional observations.

We suggest that a fundamental defect in the *Harris-Rabinowitz* doctrine is that it identifies as relevant to the

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[26] See also, e.g., Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 Cal. L. Rev. 474, 490 (1961) ("This exception today is so broad that . . . it is safe to say that the number of searches which are upheld under this exception far exceeds the number where a search warrant has been procured."); Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U.Chi. L.Rev. 664, 684 n. 117 (1961) (in Philadelphia in 1952 only 3% of arrests were authorized by warrants, and although searches were involved in most of the cases the use of warrants in those examined was virtually non-existent, citing Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U.Pa. L.Rev. 1182 (1952)); Comment, *The Cahan Case: The Interpretation and Operation of the Exclusionary Rule in California*, 4 U.C.L.A. L.Rev. 252, 258 (1957) ("It is significant that since the *Cahan* case was handed down, there have been very few California decisions concerning search warrants, indicating that such warrants are not being used."); Comment, *Search and Seizure: A Review of the Cases since People* v. *Cahan*, 45 Cal. L.Rev. 50, 53 (1957).

[27] For general discussions of this problem, see, e.g., Way, *Increasing Scope of Search Incidental to Arrest*, 1959 Wash. U. L.Q. 261; Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 Cal. L.Rev. 474, 490 *et seq.* (1961); Reynard, *Freedom From Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 Ind. L.J. 259 (1950).

reasonableness test factors which are not compatible, with the result that neither the lower courts nor the police are given adequate guidance.

The difficulties inherent in the *Harris-Rabinowitz* approach are illustrated in the case at bar. The lower court decision is perfectly consistent with one test suggested in *Harris*, i.e., the test of constructive control, since petitioner no doubt had as much constructive control of the room when he was out of it as when he was in it. But if this criterion were to govern, then plainly there would be no limits at all to an incidental search of a home.

Presumably it was in an effort to avert this result that the Court in *Harris* and *Rabinowitz* indicated that the factors discussed in the preceding portions of this brief should also be considered. But, while these other factors are well grounded in Fourth Amendment law as relevant to *a* search incident to arrest doctrine, they have no rational relation to the doctrine that includes constructive control as one of its elements.

Thus, for example, if the rule were to be that the search incident to arrest should be limited to what is necessary to make the arrest effective, so that in normal circumstances it would not extend beyond the person and things within his immediate physical control, then obviously the time and place requirement of *Agnello* would be of critical importance. But if constructive control is a valid justification for the search, why should application of that test turn upon whether the person was unfortunate enough to be arrested at home rather than in the street?

Similarly, the fact that a crime is committed in the presence of officers might well be an independent basis in some circumstances for a relatively broad search incident to arrest, in view of the officers' duty to suppress crime

swiftly wherever it is found. However, once again it is difficult to perceive why the constructive control test, if it is valid, should be restricted by the wholly independent consideration whether a crime is committed in the officers' presence. And it may be added that further confusion is generated by the fact that, since the "possession" crimes involved in *Harris* and *Rabinowitz* were not committed in the officers' presence in any sense related realistically to the necessity for search without a warrant, this test has been attenuated to such an extent that it is difficult to know what it really means.

In short, we suggest that the *Harris-Rabinowitz* doctrine in substance consists of the germ of a rule, expressed in terms of constructive control, that would broadly substitute probable cause for arrest in place of the detailed search warrant requirements of the Fourth Amendment, limited in turn by restrictions at odds with this purpose. Such a rule is incompatible with the purpose and history of the Amendment, as the dissenters in these two cases demonstrated, and also cannot provide predictability in an area where clearly understandable rules are of great importance.

In these circumstances, we urge the Court to adopt the position of the dissenters in *Harris* and *Rabinowitz*. A rule that no search or seizure incident to an arrest can be conducted without a warrant except to the extent necessary to make the arrest effective is firmly rooted in the policy of the Fourth Amendment and can be applied with reasonable consistency. To be sure, peripheral problems would still arise. Thus, for example, in some cases there would no doubt be questions as to whether a search through a house was really designed to protect the officers by finding lurking confederates. But the problems created by the

Harris-Rabinowitz doctrine lie at its center, not at its periphery.

Of course, given the *Harris-Rabinowitz* rule, we rely upon its limitations. And if *Harris* and *Rabinowitz* are not to be overruled, it is better to continue to apply these restrictions than to abandon them, for this would be tantamount to abandoning the requirement that, as a general rule, it is a magistrate who is to authorize a search, not a police officer. But we respectfully urge that the soundest course of action would be to overrule *Harris* and *Rabinowitz*.

IV.

Conclusion.

For the foregoing reasons the judgment of the District Court of Appeal of California should be reversed.

Respectfully submitted,

William H. Dempsey, Jr.
734 15th Street, N. W.
Washington, D. C.
Attorney for Petitioner
(Appointed by this Court)